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IN THE

Supreme Court of the United States

October Term, 1964

No 520

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, AMERICAN UNION TRANSPORT INC., SEATRAIN LINES, INC., THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

Petitioners

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Petitioners

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia.

OPINION BELOW

The opinion of Circuit Judge Burger of the United States Court of Appeals for the District of Columbia is set forth in Appendix A of this petition, pages 1a-10a. There is no opinion of the District Court, that Court having granted the respondents' motions to dismiss the petitioners' complaint without an opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1964, and is set forth in Appendix B to this petition, pages 11a-13a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where the relevant Federal statute, the Merchant Marine Act of 1920, as amended, restricts participation in the domestic coastwise trades to licensees who are American citizens using American-built vessels, did the Court of Appeals correctly hold that petitioners, having (or eligible for) valid licenses to engage in these trades, are without standing to review in the Federal courts the legality of agency action granting to their competitors licenses to participate in such trades which do not satisfy the standards of the statute?

STATUTES INVOLVED

Section 27 of the Merchant Marine Act of 1920, 41 Stat. 999, 46 U.S.C. § 883, as amended by Sections 1 and 4 of Public Law 86-583, 74 Stat. 321, note following 46 U.S.C., § 883; and Section 10(a), (c), (e) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009, all of which are set forth in Appendix C to this petition, pages 14a to 16a.

STATEMENT OF THE CASE

Two of the petitioners, American Union Transport, Inc., and Seatrain Lines, Inc. are water carriers engaged in the domestic coastwise trades in direct and vigorous competition with Sea-Land Service, Inc. (Sea-Land), another coastwise water carrier operator, a respondent here. The third water carrier petitioner, American-Hawaiian Steamship Company, has advanced plans to compete with Sea-Land in the coastwise trades. The remaining petitioners are railroads, namely, The Pennsylvania Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, The New York Central System, The Reading Company and the Southern Pacific Company, all of which are in competition via overland routes with Sea-Land.

The respondents are: (1) Hon. C. Douglas Dillon, Secretary of the Treasury, who has general direction and control over registry, enrollment and licensing of vessels under the Merchant Marine Act of 1920, as amended by Public Law 86-583. He has the specific duty of prescribing regulations thereunder and has done so;[1] (2) Hon. Philip Nichols, the Commissioner of Customs, head of the Bureau of Customs and an officer of the Treasury Department. By delegation he exercises the function of the Secretary of the Treasury with respect to registry, enrollment and licensing of vessels; (3) the Bureau of Customs, which is headed by the Commissioner of Customs, and is the governmental agency responsible for registry, enrollment and licensing of vessels and the administration of the coastwise laws; and (4) Sea-Land Service, Inc., a water carrier engaged in the domestic coastwise trades and the recipient of the licenses by the agency action occasioning this litigation.

The water carrier petitioners filed complaints in the District Court for the District of Columbia under the pro-

1. 19 CFR §§ 3.2(f), 3.28(d) (1964).

visions of 28 U.S.C. §§ 1331, 1332, 1337, 1391(b), (c),[2] and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009, for declaratory judgment and injunctive relief, to require the Commissioner of Customs pursuant to Section 27 of the Merchant Marine Act of 1920, as amended by Public Law 86-583, and the pertinent Treasury regulations, to deny the enrollment of certain vessels of Sea-Land for use in the domestic coastwise trades. The railroad petitioners were permitted to intervene in these proceedings and to file a complaint similar to those of the other petitioners.

Sea-Land and the Government, without answering the complaints, filed motions to dismiss them on the ground that none of the complainants had standing to maintain the litigation. After hearing oral argument, the District Court, on January 29, 1963, without an opinion, ordered the complaints dismissed. This order was appealed to the Court of Appeals for the District of Columbia. On June 26, 1964, that Court, in an opinion by Circuit Judge Burger, affirmed the judgment of the District Court.

This decision in effect holds that members of an industry—in which entry into the field and doing business therein are extensively restricted and supervised by a comprehensive scheme of regulation established by several correlated federal statutes—are without standing to test the legality of agency action under those statutes which favors one member of the industry to the serious permanent detriment of its competitors. It should be noted in this connection that the railroad petitioners are not members of the particular regulated industry, as are the water carrier petitioners, and therefore in the interest of keeping the issue in sharp focus are not here contending that they have independent standing to sue. They are only before this Court upon the assumption, amply supported by decided cases, that if the water carrier petitioners have the desired standing, they, because of their important competitive position,

2. 72 Stat. 415, 62 Stat. 931, 935.

have sufficient interest to sustain their right to participate as intervenors regardless of whether they have independent standing.[3]

When viewed in the context of the pervasive regulatory scheme which Congress has established for the domestic coastwise water carrier industry and the facts which must be assumed to be true because of the limited procedures to date, the decision of the Court of Appeals, which totally denies these petitioners the right to even test the legality of the extremely detrimental agency action, must be regarded as at least remarkable, if not alarming.

The domestic coastwise trades are not by any means open to all. Entry into this business is strictly circumscribed so that this, like other types of domestic transportation, is one of limited competition.[4] Regardless of the particular domestic coastwise trade sought to be entered, the would-be entrant must secure a license from the Bureau of Customs which, by its nature, restricts the participants to a very limited class. And certain of the trades also require a license from the Interstate Commerce Commission. Thus, to offer a common or contract carrier service for the transportation of general freight between a point in one state to a place in another, whether or not the water routes are within or beyond the continental limits of the United States, a certificate must be secured from the Interstate Commerce Commission.[5] Seatrain and American-Hawaiian, two of the petitioners, have such certificates. Seatrain's certificate authorizes operations between the East and Gulf coasts, and pursuant to this certificate has extensive operations (JA-3).* American-Hawaiian's certificate authorizes service between the East and West coasts via the Panama Canal. The re-

3. See *National Motor Freight Traffic Ass'n. v. United States*, 205 F. Supp. 592, 594 (D. of C. 1962) *aff.*, 371 U.S. 223.

4. *E.g.* For-hire motor carrier service can only be performed by a limited number of companies holding certificates or permits from the Interstate Commerce Commission, 49 Stat. 551, 552, 49 U.S.C. §§ 306, 309.

5. 54 Stat. 941, 49 U.S.C. § 909.

* "JA" refers to the Joint Appendix.

spondent, Sea-Land, also has a certificate under which it is performing service in the same areas in which Seatrain and American-Hawaiian have rights (JA-79, 89). Any service performed under these authorizations is fully regulated as to its pricing and the terms upon which it must be offered to the public and connecting carriers.[6]

But even though a water carrier has the requisite authority from the Interstate Commerce Commission to provide domestic service between one state and another over ocean routes it cannot enter the trade. Before it can operate under its certificate, it must satisfy other licensing requirements.[7] These are the requirements that restrict the entry into all of the domestic trades—regardless of whether an Interstate Commerce Commission certificate is needed to perform them. These trades include those between the continental states and Puerto Rico[8] and between the original 48 states and the new states of Hawaii[9] and Alaska.[10]

Since the very dawn of this Nation, there have been Federal laws—sometimes referred to as "cabotage" legislation—which restrict the domestic coastwise trades to those who have Federal licenses. This legislation first passed in 1789,[11] and amended frequently thereafter, has provided since the first year of its enactment that these licenses may only be issued for vessels built in the United States,[12] and since 1817, has restricted these licenses to

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6. 54 Stat. 929-952, 49 U.S.C. §§ 902-923.
7. See *Central Vermont Co. v. Durning*, 294 U.S. 33, 40.
8. 54 Stat. 930, 49 U.S.C. § 902(i).
9. 73 Stat. 12.
10. 72 Stat. 351.
11. The first statute, 1 Stat. 24, 27, provided for heavy penalty duties to be imposed against ships used in the American trades which were not of American registry.
12. Subsequent to the enactment of the first legislation, *supra*, n. 11, further legislation was enacted in 1789, 1 Stat. 55, which provided that only ships built in America and belonging to citizens thereof could be registered under the American flag. See *The Merritt*, 84 U.S. (17 Wall.) 582, 585.

American citizens.[13] The nature and extent of the privileges conferred by these licenses was the issue in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1. There, Chief Justice Marshall made it clear that the licenses issued under these laws afford valuable rights and privileges protected from impairment by the legislative actions of the several states, *Id.* at 97. The Court referred to the license as a "permit to carry on the coasting trade," *Id.* at 94, inferring that it is a great deal more than a mere identification of the vessel. In the words of the Chief Justice:

> "The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do—that is, to give permission to a vessel already proved by her enrolment to be American, to carry on the coasting trade." *Id.* at 94.

The necessity of having vessels enrolled and licensed to operate in the domestic coastwise trades and the restriction of those licenses to American citizens using American-built vessels have never been relaxed. Rather, Congress has, on several occasions, passed legislation to make the eligible class more restrictive. The objective of this legislation, the Court said, in *Central Vermont Co. v. Durning*, 294 U.S. 33, has been:

> ". . . 'to provide for the promotion and maintenance of an American merchant marine.' The policy has found expression in the enactment of a series of statutes, beginning with the first year of the government, which have imposed restrictions of steadily increasing

13. Prior to 1817, foreign ships and citizens were subjected to highly discriminatory duties which, for all practical purposes, excluded them from the domestic trades. In 1817, legislation was enacted absolutely forbidding shipment in foreign-owned vessels between ports in the United States, 3 Stat. 351. The requirement that only American-built vessels owned by American citizens are eligible to compete in the domestic trades has remained constantly in the law since 1817, 3 Stat. 351; 41 Stat. 999; 46 U.S.C. § 883.

rigor on the transportation of freight in coastwise traffic by vessels not owned by citizens of the United States." *Id.* at 38.

The Merchant Marine Act of 1920, which is the basic legislation involved here and in effect is a codification of the cabotage legislation, provides that "the privilege of engaging in the coastwise trade" is limited to vessels ". . . built in and documented under the laws of the United States and owned by persons who are citizens of the United States."[14] The purpose of this legislation was, as was the basis of the earlier legislation, to encourage the development of a strong United States flag merchant marine (App. A-7a, n. 5).

Each of the water carrier petitioners here, including American Union Transport, which in operating between New York and Puerto Rico needs no Interstate Commerce Commission certificate, has either fully complied with these provisions and thus is entitled to the licenses it possesses to engage in the domestic coastwise trades (JA-3, 69), or has vessels planned for construction which will satisfy the standards for coasting licenses (JA-89).

By contrast, the respondent, Sea-Land, is vigorously competing with Seatrain and American Union under coasting licenses which these petitioners claim have been issued by the Bureau of Customs without compliance with the law, which claim, for the purposes of the standing to sue issue, must be assumed to be true.

This claim of illegality is rested on a 1960 amendment to the Merchant Marine Act of 1920. To strengthen and tighten the "American-built" requirement of the 1920 Act, the Congress, in 1956, passed an amendment which denies licenses to vessels rebuilt abroad. To further the same purpose, the 1960 amendment provides that rebuilt vessels to be eligible for coasting licenses must be entirely rebuilt, in-

14. 41 Stat. 999, 46 U.S.C. § 883.

cluding all major components, in America.[15] The Sea-Land vessels which have been licensed do not meet this requirement since they have foreign-built mid-bodies (JA-71). The only possible basis for these Sea-Land licenses being lawful is the saving clause in the 1960 amendment which exempts from the requirement of the statute those vessels rebuilt under contracts executed prior to the date the statute was enacted (i.e., July 5, 1960) where the rebuilding was begun within the prescribed time.[16] But the petitioners claim that this exemption is not available to the respondent Sea-Land —which claim must again be assumed true on the standing issue (JA-6, 71).

The water carrier petitioners have alleged that the illegal licensing of Sea-Land to use the vessels having foreign built mid-bodies will give it an unfair and unlawful cost saving which they cannot enjoy because they must use ships completely built or rebuilt in America. The cost saving enjoyed by Sea-Land alone, greatly impairs the value of the petitioners' licenses (JA-2, 11, 73, 93).

The Court of Appeals, while recognizing that the principal purpose of the cabotage legislation from the beginning has been to stimulate and protect the coastwise merchant marine and that this purpose was likewise the motivation for the basic statute, namely, the Merchant Marine Act of 1920, upon which the petitioners premise their standing to sue (App. A-7a n. 5), holds that the 1960 amendment which merely tightens and adds certainty to the basic statute was enacted primarily for the benefit of American shipyards. Because of this the Court concludes the illegal action of the Bureau of Customs in granting Sea-Land its licenses has not invaded "any legally protected right" of the petitioners (App. A-7a).

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15. The 1956 amendment is found in Public Law 714-600, § 1, 70 Stat. 544. The 1960 amendment is found in Public Law 86-583, § 1, 74 Stat. 321 (App. C-14a).

16. Public Law 86-583, § 4, 74 Stat. 321 (App. C-15a).

With respect to the petitioners' claim that the illegally issued licenses have given Sea-Land a substantial cost saving and thus occasioned an economic loss for petitioners who cannot secure any comparable cost saving, the Court of Appeals concludes that this is a "speculative injury which does not afford a basis for standing."[17] (App. A-10a)

While the decision of the Court of Appeals only outlaws the petitioners' suit, its reasoning would appear to deny to any licensed operator in the domestic trades an opportunity to have reviewed in the courts any action of the Bureau of Customs in licensing the entry of new competitors regardless of how patent the illegality of such actions might be. Thus, if a new entrant of obvious foreign citizenship or one using vessels completely built in low-cost foreign yards were to receive a license, for all practical purposes no one could complain in the courts. That Congress could have intended this, in view of the long history of a legislative-created monopoly for American citizens using American built vessels in the domestic coastwise trades, is simply beyond belief.

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17. In the area of competition between enterprises in the same line of business it is difficult to imagine any damage more realistic and actual to one competitor than a cost saving which is conferred upon another by illegal agency action, for the cost saving inevitably results in a pricing advantage, the *ne plus ultra* of economic life. See *Schaffer Transp. Co. v. United States*, 335 U.S. 83, 91.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. In Holding That Petitioners Doing Business in a Field Restricted by Federal Statutes to a Limited Class of Licensees Are Without Standing to Sue to Test the Legality of Agency Action Singularly Favoring a Competitor in the Same Restricted Field to Petitioners' Detriment, the Court of Appeals Has Decided an Important Question of Federal Law Which Should be Settled by This Court.

Unlike some standing to sue cases involving claims of unlawful agency action where the relevant statute contains a specific provision for review by a "person aggrieved" or an adversely "affected party,"[18] or where review of agency action is specifically provided for by another statute,[19] review of agency action pursuant to the Merchant Marine Act of 1920 is not provided for specifically. But Section 10(a) of the Administrative Procedure Act[20] fills the gap by providing review of any agency action pursuant to any federal statute for:

> "Any person suffering legal wrong because of agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute . . .".

Thus, whether the relevant statute contains specific review provisions for aggrieved persons or those suffering legal wrong is immaterial for the question remains, has the particular agency action occasioned a legal wrong to the claimant of standing or placed him in a category of an "ag-

18. A typical example is the Communications Act, 48 Stat. 1093, as amended, 47 U.S.C. § 402(b).

19. Orders of the Interstate Commerce Commission, for example, are made reviewable by the Judicial Code, 62 Stat. 931, 28 U.S.C. § 1336.

20. 60 Stat. 243, 5 U.S.C. § 1009.

grieved person"?[21] While this question may be simply stated, the answer is an entirely different matter, particularly if the subject is being considered in its broader aspects.[22] Although the circumstances here do not require a consideration of the entire law in the standing to sue area, the answer to the instant question is nevertheless of the greatest importance to the orderly and sound development of the law.

The petitioning steamship companies, like the respondent Sea-Land, are doing business in a field which is restricted to a limited class and within this field they are engaged in vigorous competition with each other. To enter this field, the federal statutes require the would-be participant to have one or two licenses depending on which particular domestic trade is its objective. These licenses are completely different, for example, from the motor vehicle license tag or the motor boat registration, which are available to any one and serve such government objectives as paying for the highways, promoting public safety or identification of the vehicle operator. By contrast, the Interstate Commerce certificate required for some domestic coastwise operations and the cabotage licenses required for all such operations have as their basic objective the establishment of a small but flourishing industry better able to serve the public and the needs of the Nation.[23] These coasting licenses once acquired are extremely valuable because of the exclusiveness of the privileges they confer. The holders of the cabotage licenses are afforded the opportunity to compete for millions of dollars of freight entirely

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21. See *American Trucking Ass'n. v. United States*, 364 U.S. 1, 18.

22. See Jaffe, *Standing In Private Actions*, 75 Harv. L. Rev. 255 (1961).

23. The Court of Appeals so found with respect to the cabotage licenses. (See App. A. 7a n. 5.) And the National Transportation Policy so states with respect to the I.C.C. certificate, 54 Stat. 899, preamble to 49 U.S.C. preceding §§ 1, 301, 901, 1001.

free of the competition of non-Americans and from Americans using less expensively built foreign vessels. Yet the value of these rights can be destroyed by illegal agency action of the very type involved here.[24]

The Court of Appeals disregarded entirely the nature of the rights which the petitioners possess by reason of the basic relevant statute, and by the same token ignored the permanent and irreparable impairment of these rights by the claimed unlawful agency action. Instead, it looked to a fragment of the basic statute, which in fact does nothing more than strengthen and tighten that statute, and concluded that it, as contrasted with the statute as a whole, was enacted in response to the urging of the shipbuilders ". . . to stimulate and encourage resort to domestic shipyards and thus insure them sufficient business so that their facilities would be adequate in time of national emergency." Therefore, the Court concluded that by this fragment of the statute, Congress did not intend to give the licensees any legally protected rights (App. A-7a). This conclusion will not survive analysis.

In the first place, the Court itself recognized that this particular fragment of the statute was not only enacted for the benefit of the shipyards but also to further the objectives of the basic legislation, namely, to insure the nation of a flourishing domestic Merchant Marine. As the Court said in its review of the legislative history of the amendment:

> "Both committees reported that the bill was 'needed to close the above-mentioned loophole in the existing

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24. While in no way determinative of whether standing exists, it should be noted that the agency action required by the relevant statute is not merely ministerial. Rather, the ascertainment of the citizenship of an applicant or the "nation" of the construction of the vessel may be extremely complex quasi-judicial problems, particularly where intricate corporate structures are present. Certainly, such is the case with respect to the specific agency action complained of in this litigation (JA-6-66).

[1956] statute and to buttress our traditional national objectives affecting the coastwise trade and the shipbuilding industry.'" (App. A-8a, n. 5) [25]

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25. The American-built requirement of the Merchant Marine Act of 1920, 41 Stat. 999, 46 U.S.C. § 883, has been strengthened by two amendments. The first enacted in 1955, 70 Stat. 544 excluded for eligibility for coasting licenses vessels rebuilt in foreign shipyards. The Senate Report, commenting on the purposes of this legislation, said (S. Rep. No. 2395, 84th Cong., 2d Sess. (1956), at p. 2):

> "The Defense Department report supported the bill, and the Comptroller General, while withholding comment as to the enactment, declared that the bill 'would appear to be consonant with the spirit and purpose of the Merchant Marine Act, 1920, * * * which was designed to foster not only a strong merchant marine but also the shipbuilding industry of the United States'."

The same Report, at page 7, contains a letter of the Secretary of Commerce which says:

> "From the policy viewpoint, it seems that the closing the 'gap' in the law with respect to the foreign reconstruction of a vessel and its eligibility for use in our coastwise trade would be consistent with national maritime policy and principles.
>
> "If there should develop a substantial amount of rebuilding or remodeling in foreign yards in order to fit the vessels for service in a particular United States coastwise trade, such a development could, of course, strengthen and rehabilitate coastwise trade at a lower cost than if the ships were rebuilt or remodeled in American yards. Such lower capital cost would put the owners of those vessels in a better competitive position."

The second amendment was in 1960, 74 Stat. 321 (App. C-15a). This amendment implements the prohibition against vessels rebuilt in foreign yards being eligible for coasting licenses by providing for non-eligibility if any major components of rebuilt vesesels are constructed in foreign yards. That the purpose of this amendment was to carry out the basic objectives of the cabotage legislation, namely, of limiting the coastwise trades to American companies entirely free of foreign competition is brought out by the legislative Reports. The House Report (H. Rep. No. 1887, 86th Cong., 2d Sess. (1960), at p. 1), says:

> "The purpose of this bill is to amend existing law to close a loophole therein which would permit a frustration of the intent of Congress that vessels of foreign construction shall not be permitted to operate in the coastwise trade of the United States."

And at page 7, there is reference to a letter of the Secretary of Commerce which states:

In other words, the closing of the loopholes that existed with respect to the requirement that American-built ships be used in the domestic coastwise trades had the dual objective and purpose of not only aiding the shipyards but of also strengthening and fortifying the American flag domestic operators.[26] But even assuming the Court's ap-

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"It now appears that the coastwise laws need further strengthening in order to carry out fully the national maritime policy and principles established in the other shipping laws and the Merchant Marine Act, 1936.

"It is clear to us that the Congress in granting the protection of the coastwise laws to American operators intended that vessels built solely in American yards would be used in the trade. The law now specifically forbids the rebuilding of a coastwise vessel in a foreign yard. To allow the manufacture of a large segment of a vessel in a foreign country to be brought to the United States to be placed in the vessel in the United States, would be inconsistent with the basic policy of the coastwise laws limiting domestic operation to domestic built vessels."

The Senate Report is to the same effect (S. Rep. No. 1279, 86th Cong., 2d Sess. (1960), at p. 2):

"Section 27 of the Merchant Marine Act, 1920, as amended, gave renewed expression to a national policy dating back to the early days of the Republic when it laid down strict qualifications as to ownership, construction in U. S. shipyards, etc., regarding vessels permitted to engage in the Nation's coastwise trade. It was to emphasize and tighten the restrictions of the 1920 act in this regard that, by act of July 14, 1956, Congress further provided that any vessel legally qualified to participate in such domestic trade would be deprived of such right if it were rebuilt outside of the United States, its territories or possessions."

26. It is significant that during the early development of the cabotage laws, that is, prior to 1835, American shipbuilding costs were much lower than those of foreign yards. There was, therefore, no economic need to require the use of American-built vessels. But to insure the domestic trades would flourish, it was determined that they should be an American monopoly. To accomplish this, the American-built requirement was enacted in 1789 *supra*, n. 12, and the exclusion of vessels not owned by American citizens was enacted in 1817 *supra*, n. 13. When in 1920 Congress reviewed the needs of the American Merchant Marine, it deemed it essential to continue the American-built and American-citizen requirement for licenses to engage in the coastwise trades. The pattern is clear that Congress, from the beginning of this Nation, has felt for the domestic trades

praisal of the objective of the Congress with respect to this small portion of the statute was sound, it does not justify the denial of standing. Whatever may have been the motive of the Congress in enhancing the licenses of the restricted class by the tightening of the statute, the fact remains that the rights which the statute confers upon them alone are impaired or even destroyed if illegal licenses are issued. The harm to them is not less merely because their rights have been improved or made more valuable in response to the urgings of others.[27]

So that the rights of licensees under the Merchant Marine Act of 1920 may be properly protected, and so that the Court of Appeals' denial to the petitioners of access to the courts to set aside unlawful agency action which has destroyed a large part of the value of their licenses may be reversed, this Court should grant the Writ of Certiorari and give the matter plenary review.

2. The Holding of the Court of Appeals Is Inconsistent With Its Own Decisions and Those of This Court Involving Standing to Sue to Review Claimed Illegal Agency Action. It Is Vital to Orderly Development of the Law in This Area That Such Inconsistency Be Eliminated.

The strong trend of the law is that a licensee functioning in a field to which entry is restricted by licensing requirements has standing to test the legality of the issuing

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to flourish they must be an American monopoly entirely free of foreign competition. See TAYLOR, THE TRANSPORTATION REVOLUTION, pp. 128-131 (1951), and the Court of Appeals' review of the legislative history of the cabotage legislation in footnote 5 of its opinion (App. A-7a-9a).

27. In *Scripps-Howard Radio v. Comm'n.*, 316 U.S. 4, this Court held that a licensee had standing to test the legality of the action of the Federal Communications Commission in granting an improved license to a competitor notwithstanding the fact that the purpose of the relevant statute was "to protect the public interest in communications," and not to enhance the private rights of licensees, *Id.* at 14, 15.

of a license to another to enter such field. This is true whether the relevant statute contains a party aggrieved provision or whether standing is based upon Section 10(a) of the Administrative Procedure Act. This trend was emerging prior to *Commission v. Sanders Radio Station*, 309 U.S. 470,[28] and has become stronger since.[29] The Court of Appeals, itself, has recognized this in its very recent decision in *Whitney Bank* which is presently before this Court both on the standing and substantive issues. There it held that a state bank having a state charter guarded by a combination of state and federal statutes had standing to contest in a federal court the agency action of the Comptroller of the Currency in granting, without compliance with the law, a license to a new competitor.[30] While the Circuit Court attempts to distinguish *Whitney Bank* on the ground that the federal statute ". . . had guaranteed that the state bank would be free of certain competition from national banks,"[31] this is no real distinction because the instant relevant statute was designed by Congress to free the existing licensees from foreign competition, or domestic competition using foreign built ships.[32] Whether the licensing statute guarantees freedom from a specific type of competition, or limits the competition to a class which excludes a specific type of competition, the result is the same regardless of the semantics. In each instance the license created by the enabling statute confers a privilege of doing business in a field of limited competition and in each the value of the privilege is impaired by

28. *Clairborne-Annapolis Ferry v. United States*, 285 U.S. 382, 390.

29. See *Scripps-Howard Radio v. Comm'n.*, *supra*, n. 23 at 14; see also Jaffe, *Standing In Private Action*, 75 Harv. L. Rev. 255, 274-287 (1961).

30. *Whitney Nat. Bank v. Bank of New Orleans & Trust Co.*, 323 F. 2d 290, 300 (D.C. Cir. 1963), *cert. granted*, March 23, 1964, 376 U.S. 948.

31. App. A-10a, n. 6.

32. App. A-7a, n. 5.

the illegal issuance of a license to a competitor. Thus, these cases cannot be realistically distinguished.

The instant decision of the Court of Appeals is equally inconsistent with, and contrary, to, its earlier decision in *Atchison, Topeka & Santa Fe Railway Co. v. Summerfield*, 229 F. 2d 777 (D. C. Cir. 1955).[33] There the Court held the railroads operating under statutes, which gave them what in effect was a license to carry the mail and which obligated them to furnish the equipment necessary to move it, had standing to contest the legality of the Postmaster General's plan to divert mail traffic to the air carriers, *Id.* at 779.

The factual similarity between *Atchison* and the instant case is striking. The railroads' standing to sue in *Atchison* was premised upon the impairment of their investment in equipment necessary to fulfil the obligations imposed upon them by the relevant statute. Here the petitioning steamship companies are likewise required to spend a great deal more money to acquire the equipment demanded by the licensing statute than would otherwise be necessary, since were it not for the American-built limitation, they would be free to purchase vessels or major components in low-cost foreign yards. But the Court of Appeals says that the damage to these petitioners' investment by the licensing of Sea-Land, notwithstanding its use of the forbidden foreign-built components which gives it a decided cost advantage, does not afford standing because the injury is "speculative."[34] (App. A-10a).

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33. *Cert. denied*, 351 U.S. 926.

34. In Seatrain's complaint, it is alleged that it has already contracted for American-built midbodies to be constructed and inserted in two of its ships in American yards at a cost in excess of $1,500,000 (JA-3), and that Sea-Land's use of ships with foreign-built midbodies will result in irreparable harm to it (JA-11). Similar allegations are in the complaint of American-Hawaiian (JA-89, 93). How the injury can be thought "speculative" in view of these assumed facts cannot be understood. That the cost of building ships or the major components thereof in American yards is much more expensive than in foreign yards is amply established by Section 502(b) of the Merchant Marine Act of 1936, 49 Stat. 1996, 46 U.S.C. §1152(b), which provides for construction-differential

Again, this is a difference based on semantics or at the very best on a closely calibrated scale of degrees. Whether the damage has already taken place, or will be incurred as events transpire, should not be the basis for standing. The answer to the question, rather, must hinge on whether the would-be litigants have a right or privilege which has been, or will be, impaired by the agency action. By such test, the steamship petitioners here have standing.

The holdings of *Tennessee Power Co. v. T. V. A.*, 306 U.S. 118; *Alabama Power Co. v. Ickes*, 302 U.S. 464; *Kansas City Power & Light Co. v. McKay*, 225 F. 2d, 924 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 884, referred to by the Court of Appeals (App. A-6a), to the effect that "injury resulting from increased competition" alone does not afford a basis for standing, in no way speak against the granting of the Writ. In none of these cases was there an allegation that the agency action complained of was pursuant to the statutes under which the complaining companies were licensed. Furthermore, they were strangers to the class embraced by the statutes under which the benefits were made available. All they could rely upon to establish their standing to sue was a competitive disability to them created by a statute aiding others. This, those cases held, was not enough. Whether those cases are sound, or not, in view of recent developments in the law, is beside the point, for here petitioners bottom their standing upon the fact that they are members of a class restricted by the licensing requirements of the very statute which is utilized to benefit another member of the same licensed class to their direct detriment.

If there are to be any bench marks to determine licensees' standing to sue, it would appear imperative that this Court grant the writ so that authoritative pronouncements in this extremely important area of the law may be made.

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subsidies for United States vessels built in American yards which are engaged in foreign commerce. By today, the subsidy which was, when originally established in 1936, 50 percent, has grown to 55 percent, 74 Stat. 362, as amended.

CONCLUSION AND REQUEST FOR RELIEF

It is enough reason for granting the Writ that the petitioners, obviously injured by the claimed unlawful action of the Bureau of Customs, are denied the right to plead their cause before the federal bench for, if they are turned away, that agency, with complete immunity, can impair or destroy the valuable licenses which the Merchant Marine Act of 1920, as amended, makes available only to members of a restricted class. And there is additional reason to do so where the decision of the Court of Appeals is inconsistent with the trend of the law in the standing to sue field and would bring confusion and new doubt in what is already a most difficult area. For these and the reasons set forth in greater detail above, it is most respectfully submitted that the Writ of Certiorari to the Court of Appeals for the District of Columbia should be granted.

Respectfully submitted,

GORDON P. MACDOUGALL
GEORGE F. GALLAND
WARREN E. BAKER
JEREMIAH C. WATERMAN
CARL HELMETAG, JR.
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Carl Helmetag, Jr., Attorney for the Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of September, 1964, I served copies of the foregoing petition on the several parties by mailing copies thereof in duly addressed envelopes, with postage prepaid, as follows:

1. On the Respondents, Hon. C. Douglas Dillon, Secretary of the Treasury; Hon. Philip Nichols, Jr., Commissioner of Customs, and the Bureau of Customs; by copies to: Hon. Nicholas deB. Katzenbach, Attorney General of the United States, Hon. Archibald Cox, the Solicitor General, Carl Eardley, Esq., David C. Acheson, Esq., Alan S. Rosenthal, Esq., Kathryn H. Baldwin, Department of Justice, Washington 25, D.C.; and

2. On the Respondent, Sea-Land Service, Inc., by copies to: Daniel M. Gribbon, Esq., and William H. Allen, Esq., 701 Union Trust Building, Washington 5, D.C.

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CARL HELMETAG, JR.

APPENDIX A.

Opinion of the Circuit Court.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 17753.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Appellants,

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL.,
Appellees.

No. 17755.

AMERICAN UNION TRANSPORT, INC.,
Appellant,

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL.,
Appellees.

Appendix A

No. 17756.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
Appellant,

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL.,
Appellees.

No. 17764.

SEATRAIN LINES, INC.,
Appellant,

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Decided June 26, 1964

Mr. Warren E. Baker, for appellant in No. 17756, argued for all appellants.

Mr. Joseph F. Healy, Jr., also entered an appearance for appellant in No. 17764.

Mr. Jeremiah C. Waterman was on the brief for appellants in No. 17753.

Mr. George F. Galland was on the brief for appellant in No. 17755. *Mrs. Amy Scupi* also entered an appearance for appellant in No. 17755.

Mr. Gordon P. MacDougall was on the brief for appellant in No. 17756.

Miss Kathryn H. Baldwin, Attorney, Department of Justice, with whom *Messrs. David C. Acheson*, United States Attorney, and *Alan S. Rosenthal*, Attorney, Department of Justice, were on the brief, for appellees Dillon, Nichols and Bureau of Customs.

Mr. Daniel M. Gribbon, with whom *Mr. William H. Allen was on the brief*, for appellee Sea-Land Service, Inc. *Mr. Robert L. Randall* also entered an appearance for appellee Sea-Land Service, Inc.

Before BAZELON, *Chief Judge*, and FAHY and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge*: Complaints filed by appellants in the District Court sought declaratory judgments and injunctive relief to require appellees to apply Section 27 of the Merchant Marine Act of 1920, 41 STAT. 999 (1920), as amended, 74 STAT. 321 (1960), 46 U. S. C. § 883 (Supp. IV 1963), and pertinent Treasury Regulations adopted pursuant thereto[1] so as to deny enrollment in the coastwise trade to certain vessels. The District Court dismissed the complaints and these appeals followed.

Three of appellants are coastwise carriers who compete directly with Sea-Land Service, Inc., intervenor, the present owner of the two vessels claimed by appellants to have been illegally enrolled; other appellants are railroads who were granted leave to intervene in the District Court on their allegation that their transcontinental freight carriage is also in substantial direct competition with Sea-Land. Appellants claim that the documenting of two rebuilt ves-

1. 19 C. F. R. §§ 3.2(f), 3.28(d) (1964).

sels by the Commissioner of Customs was a violation of Section 27 of the Act as amended in 1960[2] and its relevant regulations. The 1960 amendment, except for a limited saving clause,[3] prohibited enrollment and licensing of vessels "jumboized" by installation of foreign-made midbodies, or midsections. Additionally, two appellants contend that an administrative hearing was required on the eligibility of the vessels for enrollment.[4]

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2. [N]o vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coastwise trade, by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt, shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States, its Territories (not including trust territories), or its possessions . . . .

74 STAT. 321 (1960), 46 U. S. C. § 883 (Supp. IV 1963).

3. This Act shall be effective from the time of enactment hereof: *Provided, however,* That no vessel shall be deemed to have lost its coastwise privileges as a result of the amendments made by this Act if it is rebuilt within the United States, its Territories (not including trust territories), or its possessions under a contract executed before such date of enactment and if the work of rebuilding is commenced not later than twenty-four months after such date of enactment.

P. L. 86-583, § 4, 74 STAT. 321 (1960), 46 U. S. C. § 883 (Note; Supp. IV 1963).

4. Although we do not reach the merits, the background of appellants' claims is important. In June and July of 1962, appellants Seatrain Lines, Inc., and American-Hawaiian Steamship Co. advised the Commissioner of Customs that intervenor Sea-Land Service, Inc., had publicly announced the conversion of two American-built tankers for use in the coastwise trade by insertion of foreign-built midsections; appellants alleged this was an attempt to avoid the prohibition against the use of foreign midbodied vessels in the coastwise trade without compliance with the saving clause, quoted at note 3, *supra*. Although the construction contracts were executed before the cutoff date in the saving clause of the 1960 amendment, appellants alleged that the contracts were not bona fide rebuilding agreements within the terms of the saving clause. Appellants protested any documentation of these two vessels, and requested a full evidentiary hearing. Following a conference the Commissioner advised that no application for documentation of the challenged ships had been received, that these allegations had been considered, but that they did not justify holding

Appellees contend that appellants are without standing to challenge in court the actions of the Commissioner of Customs and the Secretary of the Treasury with regard to these ships. We agree. Allegation of a legally protected right is a constitutional predicate of standing to attack governmental action. See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 140 (1951) (principal opinion); *Gonzales v. Freeman*, No. 17765, D. C. Cir., May 7, 1964, p. 6. The tests for standing to review agency action are found in Section 10(a) of the Administrative Procedure Act:

> Right of Review
>
> Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

60 STAT. 243 (1946), 5 U. S. C. § 1009(a) (1958). Under this statute appellants have standing to challenge agency action which they allege either causes them a "legal wrong," or adversely affects or aggrieves them "within the meaning of any relevant statute."

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that the rebuilding of the vessels was outside the saving clause. After appellants had again requested an evidentiary hearing, the Assistant Secretary of the Treasury replied that the Secretary had advised the Commissioner to consider appellants' "application with due regard to the interest of all [protesting] Steamship Companies . . ." and that the questions raised would be "fully examined." Shortly thereafter the Commissioner invited appellants to present arguments and documents to him at an "informal" meeting on the application for documentation of one of the challenged vessels; the Commissioner noted, however, that no formal hearing was required under the Administrative Procedure Act or any other statute and none would be held. Appellants presented documentary evidence to the Commissioner, but they were not afforded an opportunity to call witnesses, examine documents in the possession of the Commissioner, or obtain production of additional documents. Immediately thereafter the Commissioner announced he would enroll the vessels. American-Hawaiian protested to the Secretary of the Treasury the Commissioner's failure to conduct a full investigation; Seatrain then instituted the present action and the other appellants were granted leave to intervene in the District Court.

"Legal wrong," as we have only recently noted, is the invasion of a legally protected right. See *Gonzalez v. Freeman, supra* at n. 6, p. 10. Thus, in order to make out a claim of "legal wrong" under Administrative Procedure Act § 10(a), appellants must assert some legally protected right to be free of the competition provided by the two vessels whose documentation they are challenging. This court has very recently spoken on this aspect of standing. When "Congress has not given them any such standing by express or implied provision of statute . . ., mere economic competition made possible by governmental action (even if allegedly illegal) does not give standing to sue in the courts to restrain such action. *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U. S. 118 (1939); *Alabama Power Co. v. Ickes*, 302 U. S. 464 (1938); *Kansas City Power & Light Co. v. McKay*, 96 U. S. App. D. C. 273, 225 F. 2d 924, cert. denied, 350 U. S. 884 (1955)." *Texas State AFL-CIO v. Kennedy*, — U. S. App. D. C. —, —, 330 F. 2d 217, 219 (1964). For purposes of standing in this case, the sufficiency of appellants' allegations of "legal wrong" thus depend upon congressional intent to bestow upon them a legal right to protection from such competition.

Similarly, appellants' allegations that they are "adversely affected or aggrieved . . . within the meaning of any relevant statute" depend for their adequacy as to standing upon the congressional purpose underlying the relevant sections of the Merchant Marine Act of 1920, as amended. See *Kansas City Power & Light Co. v. McKay*, 96 U. S. App. D. C. at 281, 225 F. 2d at 932; Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 287 (1961). Under either leg of Section 10(a), therefore, since appellants complain only of government enhancement of economic competition, they must demonstrate "statutory aid to standing." *Cf. United Milk Producers of New Jersey v. Benson*, 96 U. S. App. D. C. 227, 229, 225 F. 2d 527, 529 (1955).

Appellants contend that the statutory scheme of barring from the coastwise trade ships which were rebuilt abroad or whose midbodies were built abroad was intended to promote on equal terms competition between coastwise carriers and thus to protect and benefit the shipowner appellants in the interests they are asserting. That some competitive parity is one of the consequences of these statutory provisions is doubtless correct; but the broad congressional purpose underlying these particular enactments was to stimulate and encourage resort to domestic shipyards and thus ensure them sufficient business so that their facilities would be adequate in time of national emergency. Congress did not intend to insulate coastwise carriers from other domestic competition or to give them any legally protected right to be free of such competition.[5]

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5. From the earliest days of the Republic, Congress has been concerned with stimulating and protecting the growth of an American-built and controlled coastwise Merchant Marine. See 1 STAT. 27-28 (1789). Encouragement of a strong United States-flagship Merchant Marine was the primary motivation for the Merchant Marine Act of 1920, see S. REP. No. 573, 66th Cong., 2d Sess. 1-6 (1920); 59 CONG. REC. 7342 (1920) (Remarks of Sen. Ransdell). although protection of shipyards was even then of auxiliary importance, see 41 STAT. 997-98 (1920) (tax concessions to shipowners engaging in foreign trade must be used to construct new ships in domestic yards). In 1935, the Act was amended to prohibit operation in the coastwise trade of vessels which after being built in American shipyards or documented under the laws of the United States were sold to foreign owners. 49 STAT. 442 (1935). The principal aim of this amendment was to encourage resort to American shipyards by preventing cheap purchase of ships which previously had been sold to a foreign buyer. See S. REP. No. 870, 74th Cong., 1st Sess. 3 (1935); H. R. REP. No. 118, 74th Cong., 1st Sess. 3 (1935). In the Senate and House Reports on this 1935 amendment appears the sole mention of congressional concern for protecting coastwise carriers from the competition of cheaper domestic vessels. See S. REP. No. 870, *supra*; H. R. REP. No. 118, *supra*. For a discussion of more modern Merchant Marine legislation, see generally, Morse, *A Study of American Merchant Marine Legislation*, 25 LAW & CONTEMP. PROB. 57 (1960).

A 1956 amendment for the first time made ship *rebuilt* abroad ineligible for the coastwise trade. 70 STAT. 544 (1956). This 1956

Finally, appellants rely upon *Atchison, Topeka and Santa Fe Railway Company v. Summerfield*, 97 U. S. App. D. C. 203, 229 F. 2d 777 (1955), *cert. denied*, 351 U. S. 926 (1956), for the proposition that their prior investments in

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amendment was "introduced at the request of the shipbuilding and repair interests of the country, [and] was designed to assist the shipyards of the United States by making applicable to vessels rebuilt in foreign yards the historic policy of exclusion from coastwise trade which has always applied, with certain exceptions, to vessels constructed outside the United States," S. REP. No. 2395, 84th Cong., 2d Sess. 1 (1956); see 102 CONG. REC. 11825 (1956) (Remarks of Sen. Bible); it was opposed "by a witness representing several steamship associations." S. REP. No. 2395, *supra* at 2; *cf. id.* at 7 (Letter from Sec. of Comm. to Ch'm'n, Comm. on Interst. and For. Commerce); H. R. REP. No. 2293, 84th Cong., 2d Sess. 3 (Letter from Sec'y of Commerce to Ch'm'n, Comm. on Merch. Mar. and Fisheries). The Navy Department recognized that the 1956 amendment would "aid this seriously distressed industry [shipbuilding], and would assist the Department of Defense in its attempts to maintain the mobilization capacity of this country's shipyards." S. REP. No. 2395, *supra* at 2; H. R. REP. No. 2293, *supra* at 6 (Letter from Act'g Judge Adv. Gen. of the Navy to Ch'm'n, Sen. Comm. of Interst. and For. Commerce and to Ch'm'n, House Comm. on Merch. Mar. and Fisheries). Thus, this amendment, the direct antecedent of the 1960 amendment, was intended basically as a benefit to *shipyards* not shipowners in the coastwise trade. See S. REP. No. 2395, *supra* at 1-9; H. R. REP. No. 2293, *supra* at 2-8.

The 1960 amendment was passed in response to a ruling of the Commissioner of Customs, which the "shipbuilding officials in this country viewed with alarm," S. REP. No. 1279, 86th Cong., 2d Sess. 3 (1960); H. R. REP. No. 1887, 86th Cong., 2d Sess. 3 (1960), that foreign midbodies could be used in the rebuilding of domestic ships without forfeiture of coastwise privileges. Both committees reported that the bill was "needed to close the above-mentioned loophole in the existing [1956] statute and to buttress our traditional national objectives affecting the coastwise trade and the shipbuilding industry." *Ibid.* And see S. REP. No. 1279, *supra* at 4, 6; H. R. REP. No. 1887, *supra* at 4, 5 (Letter from Acting Sec'y of the Treas. and Letter from Sec'y of Commerce to Ch'm'n, Sen. Comm. on Interst. and For. Commerce and Ch'm'n, House Comm. on Merch. Mar. and Fisheries). Congressional debate on the 1960 amendment, as on its 1956 forerunner, was extremely brief. However, an indication of congressional purpose may be drawn from the remarks of Representative Gross:

> I am glad to see this interest in protecting American industry and American labor by requiring that the rebuilding of ships be carried out in American yards. I hope that the Members of the

American-built and -rebuilt ships as prerequisite to engaging in the coastwise trade give them standing to challenge action which may diminish the value of those investments. The *Atchison* case does not stand for that proposition; there this court found that the appellant railroads had standing to challenge a decision of the Postmaster General to conduct an experimental program of transporting first-class mail between certain points via air rather than the customary rail route. It was the "present interest stemming from substantial investments in cars and equipment" so purchased that gave "the plaintiff railroads . . . standing in court to challenge the alleged illegal act." 97 U. S. App. D. C. at 205, 229 F. 2d at 779. Essential to Atchison's standing in that case was the fact that the Postmaster had "explicitly discontinued the use of certain

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House will extend the same treatment . . . [and] give some protection to agriculture as well as the shipbuilding industry.

106 CONG. REC. 14253 (1960) (Remarks of Rep. Gross). Thus, the exclusion from coastwise trade of ships rebuilt with foreign midsections was the final step in effectuation of an historic congressional purpose to aid shipbuilding interests, a purpose evidenced in the 1920 Act and in the 1935 and 1956 amendments.

The original reason underlying congressional concern for the adequacy of American shipyards was to ensure the availability of sufficient construction and repair facilities to meet the needs of defense mobilization in a time of national emergency. Undeniably, provision for adequate repair and construction facilities at home is, at least in part, also necessary to a strong American coastwise maritime fleet. Thus, in a general sense, promotion of shipyard interests serves the paramount historic policy of providing for a strong Merchant Marine. And to a certain extent, then, just as it can be argued that a viable Merchant Marine is fostered by competition on equal terms between coastwise vessels, it may be contended with some merit that as shipyard interests are furthered, so are those of the coastwise shipowners. This rather attenuated consequence, however, does not of itself import into the enactments of 1956 and 1960—regarding foreign rebuilding—the congressional purpose of creating legally protected rights in *coastwise carriers* such as appellants. Indeed, as we have shown, the very scanty legislative history which is available on the intendment of these acts demonstrates no such concern on the part of Congress. It is difficult therefore to conclude that Congress intended by these acts to confer a benefit on operators in the coastwise trade.

railroad equipment," which the railroads had "acquired . . . because they were commanded to do so by law." *Ibid.* Although appellants are required to use vessels built or rebuilt in American yards in order to engage in the coastwise trade, any economic loss from competition with carriers who secure the benefit of lower construction costs under the saving clause of the 1960 amendment is a speculative injury which does not afford a basis for standing.[6]

We therefore conclude that under Administrative Procedure Act § 10(a), 60 STAT. 243, 5 U. S. C. § 1009(a) (1958), appellants' allegations do not sufficiently claim that appellants have suffered a "legal wrong" or have been "adversely affected or aggrieved . . . within the meaning of" the Merchant Marine Act of 1920, as amended.

Affirmed.

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6. Appellants' reliance on Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Company, 116 U. S. App. D. C. 285, 323 F. 2d 290 (1963), *cert. granted*, 376 U. S. 948 (1964), is also misplaced. There, this court held that certain state banks had standing to attempt to enjoin the Comptroller of the Currency from issuing to a national bank a Certificate of Authority allegedly in violation of federal banking statutes. The court found that federal statutes had guaranteed that state banks would be free of certain competition from national banks.

APPENDIX B.

Judgment of Circuit Court.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit.

FILED JUN 26 1964
NATHAN J. PAULSON
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 17,753 SEPTEMBER TERM, 1963.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Appellants,

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL.,
Appellees.

Civil 2543-62.

No. 17,755.

AMERICAN UNION TRANSPORT, INC.,
Appellant,

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL.,
Appellees.

Civil 2543-62.

No. 17,756.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
Appellant,

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL.,
Appellees.

Civil 2543-62.

No. 17,764.

SEATRAIN LINES, INC.,
Appellant,

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL.,
Appellees.

Civil 2543-62.

Appeals from the United States District Court for the District of Columbia.

Before: BAZELON, *Chief Judge*, and FAHY and BURGER, *Circuit Judges*.

JUDGMENT.

These cases came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the District Court appealed from in these cases is hereby affirmed.

It is further ORDERED by the court that appellee Sea-Land Service, Inc., recover from appellants its taxable costs on these appeals, and have execution therefor.

Per *Circuit Judge* BURGER.

Dated: JUN 26, 1964.

APPENDIX C.

Statutes Involved.

SECTION 27 OF THE MERCHANT MARINE ACT, 1920, 41 Stat. 999, 46 U. S. C. § 883, as amended by Section 1 of Public Law 86-583, 74 Stat. 321.

> No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this Act: * * * *Provided further,* That no vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coastwise trade, by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt, shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States, its Territories (not including trust territories), or its possessions: * * *

SECTION 4 of PUBLIC LAW 86-583, 74 Stat. 321.

Section 4. This Act [amending Section 27 of the Merchant Marine Act, 1920] shall be effective from the time of enactment hereof [July 5, 1960]: *Provided, however,* That no vessel shall be determined to have lost its coastwise privileges as a result of the enactment made by this Act if it is rebuilt within the United States, its Territories (not including trust territories), or its possessions under a contract executed before such day of enactment and if the work of rebuilding is commenced not later than twenty-four months after such date of enactment.

SECTION 10 of the ADMINISTRATIVE PROCEDURE ACT, 60 Stat. 243, 5 U. S. C. § 1009.

Judicial Review.

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

• • •

(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. • • •

(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 520

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, AMERICAN UNION TRANSPORT, INC., SEATRAIN LINES, INC., THE PENNSYLVANIA RAILROAD COMPANY, ET AL., PETITIONERS

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The order of the district court dismissing the complaints is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a–10a)[1] is reported *sub nom. The Pennsylvania Railroad Co., et al.* v. *C. Douglas Dillon, Secretary of the Treasury, et al.*, 335 F. 2d 292.

[1] The reference "Pet. App." is to the appendix in the petition.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a–13a) was entered on June 26, 1964. The petition for a writ of certiorari was filed on September 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners, as competitors of operators in the domestic coastwise trade, have standing to challenge the action of the Commissioner of Customs in ruling that certain vessels of such operators are entitled to coastwise privileges.

STATUTES INVOLVED

Provisions of Section 27 of the Merchant Marine Act of 1920, 41 Stat. 999, 46 U.S.C. 883, as amended by Public Law 86–583, 74 Stat. 321, and of Section 10(a) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009(a), are set forth in the Appendix, *infra*, pp. 11–12.

STATEMENT

This action was commenced by petitioner Seatrain Lines, Inc., a common carrier by water in the coastwise trade, against the Secretary of the Treasury, the Bureau of Customs, the Commissioner of Customs, and Sea-Land Service, Inc., a competitor of Seatrain, for a declaratory judgment and injunctive relief. The complaint sought to restrain the Commissioner of Customs from enrolling, and Sea-Land from operating, two vessels in the coastwise trade. Seatrain alleged economic injury through increased competition

from such operation.[2] The remaining petitioners are two other common carriers by water and several railroads. Also alleging competition with Sea-Land and economic injury, they sought, and were granted, leave to intervene.[3]

The Commissioner of Customs, head of the Bureau of Customs, which is under the supervision of the Secretary of the Treasury, is "specially charged with the decision of all questions" relating to the documentation of vessels.[4] Documentation takes two forms: that of registry, the purpose of which is to declare the nationality of a vessel engaged in trade with foreign countries and to enable her to assert that nationality wherever she may be; and that of enroll-

[2] Seatrain Lines, Inc., operates between certain Atlantic and Gulf coast ports under a certificate of public convenience and necessity from the Interstate Commerce Commission (J.A. 2–3, 11—this reference is to the Joint Appendix on appeal in the Court below). Implicit in petitioner's allegation that "Sea-Land is a common carrier by water and competes for traffic with Seatrain's service" (J.A. 4) is the fact that Sea-Land's operation, and competition for such traffic, is carried on under a similar certificate.

[3] American Union Transport, Inc., is a common carrier by water operating two vessels between New York (and other Atlantic ports of the United States) and San Juan, Puerto Rico (J.A. 69, 73). American-Hawaiian Steamship Company holds a certificate of public convenience and necessity as a common carrier by water from the Interstate Commerce Commission, has been engaged in the intercoastal trade, and anticipates re-entry into that trade (J.A. 89, 93). The railroads claim competition with Sea-Land's coastwise operations via overland routes (J.A. 79, 83), but they do not claim any independent standing to sue (Pet. 4–5).

[4] Act of July 5, 1884, Section 2, 23 Stat. 118, as amended, 46 U.S.C. 2.

ment, which shows the national character of a vessel engaged in coastwise trade and accords her the privilege of operating in that trade.[5]

Specifically, petitioners challenge the Commissioner's re-enrollment of two vessels which were rebuilt with foreign-built midbodies (allegedly less costly than their American counterparts) in an American shipyard in order to increase their carrying capacity. They claim that such enrollment violated the provisions of Section 27 of the Merchant Marine Act of 1920, 41 Stat. 999, 46 U.S.C. 883, as amended by Public Law 86–583, 74 Stat. 321. (See Appendix, *infra*, p. 11).

As originally enacted, Section 27 provided that no merchandise should be transported by water, or by land and water, between points in the United States embraced within the coastwise laws in any vessel other than a vessel built in and documented under the laws of the United States and owned by persons who were citizens of the United States. 46 U.S.C. 883 (1952 ed.). This section was amended by the Act of July 14, 1956, 70 Stat. 544, to add the proviso that vessels with coastwise privileges which were rebuilt in foreign shipyards could not be re-enrolled. Subsequently, the section was further amended by the Act of July 5, 1960, Public Law 86–583, 74 Stat. 321, to provide that

[5] *Anderson* v. *Pacific Coast S.S. Co.*, 225 U.S. 187, 199. The purpose of the registering and enrolling acts, as found by this Court, was "to encourage our own trade, navigation, and shipbuilding", a broad national purpose designed to build a strong American merchant marine. *Old Dominion Steamship Co.* v. *Virginia*, 198 U.S. 299, 307.

a vessel of more than 500 gross tons which had acquired the right to engage in the coastwise trade and was later rebuilt, should not have the right to engage in such trade thereafter, "unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel," was effected within the United States, its territories or possessions. However, the amendment carried a limited saving clause, as follows:

> SEC. 4. This Act shall be effective from the time of enactment hereof: *Provided, however,* That no vessel shall be deemed to have lost its coastwise privileges as a result of the amendment made by this Act if it is rebuilt within the United States, its Territories (not including trust territories), or its possessions under a contract executed before such date of enactment and if the work of rebuilding is commenced not later than twenty-four months after such date of enactment.

This statute was implemented by Treasury Department regulations.[6]

Contending that the rebuilding had not been performed under bona fide contracts entered into prior to July 5, 1960, petitioners Seatrain and American-Hawaiian protested to the Commissioner. After full consideration,[7] the Commissioner concluded that the

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[6] 19 C.F.R. § 3.2(f), 25 F.R. 13355, as amended, 25 F.R. 13687; and 19 C.F.R. § 3.28, 25 F.R. 13355, as amended, 25 F.R. 13687 (T.D. 55278), and 26 F.R. 2641 (T.D. 55347).

[7] Petitioners availed themselves of the opportunity to present their views in writing and in person, both in conference at the Bureau and thereafter at an informal hearing. There is no statutory or regulatory requirement for a formal hearing.

rebuilding of the vessels was within the saving clause of the 1960 amendment, and that the vessels were entitled to enrollment (J.A. 9–11, 57–60, 94–95; see also Pet. App. 4a, n. 4).

The district court dismissed the ensuing complaints for lack of standing and the court of appeals affirmed. It ruled that the assertion that economic competition was made possible by an allegedly invalid administrative action was insufficient by itself to confer standing to contest the validity of the action; that petitioners were therefore required to show some "statutory aid to standing" in the form of a demonstration of congressional intent to confer on them a legally protected right to be free from such competition; and that petitioners had failed to make such a showing (Pet. App. 6a–7a).

ARGUMENT

This case turns entirely upon its particular facts and presents no question of general importance. The decision, moreover, is clearly correct.

The Administrative Procedure Act does not dispense with the necessity of a showing that petitioners have a legally protected interest to assert. Under Section 10(a) of that Act, 5 U.S.C. 1009(a), they must allege a "legal wrong" or that they have been "adversely affected or aggrieved * * * within the meaning of any relevant statute." Certainly, there is no generalized right to be free of competition. *Alabama Power Co.* v. *Ickes*, 302 U.S. 464; *Tennessee Electric Power Co.* v. *T.V.A.*, 306 U.S. 118. So far as the relevant statute (the Merchant Marine Act

of 1920) is concerned, it makes no provision for judicial review and evinces no congressional purpose to confer enforceable rights on parties in petitioners' position.

The court of appeals correctly concluded, on the basis of its examination of the objectives of the Merchant Marine Act and, more particularly, the legislative history of Section 27 (Pet. App. 7a–9a, n. 5), that the principal aim of the statute was not to protect coastwise carriers such as petitioners from the competition alleged; rather, "the broad congressional purpose underlying these particular enactments was to stimulate and encourage resort to domestic shipyards and thus ensure them sufficient business so that their facilities would be adequate in time of national emergency" (Pet. App. 7a).

The legislative history of the amendments to Section 27 leaves no room for doubt on this score. The opening words of the Senate Report on the bill which became the 1956 amendment (70 Stat. 544), stated that the bill,

> * * * introduced at the request of the shipbuilding and repair interests of the country, was designed to assist the shipyards of the United States by making applicable to vessels rebuilt in foreign yards the historic policy of exclusion from the coastwise trade which has always applied, with certain exceptions, to vessels constructed outside the United States [S. Rep. No. 2395, 84th Cong., 2d Sess., p. 1].

The House Committee considering the same bill pointed out that one of the major purposes of the

historic restrictive policy was "the preservation of an adequate American shipbuilding and ship-repair industry, which is so necessary in time of national emergency." H. Rep. No. 2293, 84th Cong., 2d Sess., p. 2.

When the 1960 amendment (74 Stat. 321) was presented, the same considerations were paramount. The House Committee stated (H. Rep. No. 1887, 86th Cong., 2d Sess., p. 3) that it was "of the opinion that this legislation is needed to close the * * * loophole in the existing statute and to buttress our traditional national objective affecting the coastwise trade and the shipbuilding industry." And the Secretary of Commerce, in recommending favorable consideration, commented:

> One of the major objectives of the Merchant Marine Act of 1936 is to foster and maintain the shipbuilding industry in the United States by placing work in the domestic shipyards so that the yards will be sustained for mobilization and national defense purposes. At the present time shipyards in this country need work very badly and there are recent examples of instances where, had this proposed legislation been the law, additional work might have been generated for American shipyards [*Id.*, p. 7].

This case is quite unlike those in which standing was based on a party's complaint of economic injury resulting from the grant to others of new or extended operating rights by an agency vested with broad power

to regulate the industry in question, such as the Interstate Commerce Commission and the Federal Communications Commission.[8] Enrollment of a vessel with coastwise privileges does not carry with it the right to conduct operations as a common carrier by water in the coastwise trade. That right is conferred by a certificate of public convenience and necessity, issued not by the Commissioner of Customs, who is charged with the documentation of vessels, but by the Interstate Commerce Commission, which also regulates fares, rates and other aspects of the coastwise trade.[9] See Pet. 5–6. This case thus does not involve "the pervasive regulatory scheme which Congress has established for the domestic coastwise carrier industry" (Pet. 5), but, rather, the ancient and purely public business of documenting vessels.

It is one thing to find standing based upon alleged competitive injury where the statutory scheme is one of comprehensive regulation and where Congress has manifested an intention to authorize judicial review at the instance of all who may claim that they are affected by the administrative action in question. It

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[8] See, *e.g.*, *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1; *Scripps-Howard Radio* v. *Commission*, 316 U.S. 4; *F.C.C.* v. *Sanders Radio Station*, 309 U.S. 470. Moreover, in each of these cases, cited by petitioners at Pet. 12, 16, 17, the "relevant statute" contained express provision for judicial review.

[9] 49 U.S.C. 901-923. Carriage between United States ports and Puerto Rico in which American Union Transport competes with Sea-Land, is excluded from the jurisdiction of the I.C.C. (49 U.S.C. 902(i)), and is regulated by the Maritime Commission under 46 U.S.C. 801–842.

is another to do so where Congress has made no provision for court review and the claims of those who assert adverse effect are far removed from the purposes for which the statute was enacted. In the instant case, which falls within the latter class and incidentally involves a quite speculative claim of injury, there is no basis for constituting these petitioners, in Judge Frank's phrase, "private Attorneys General."[10]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

ALAN S. ROSENTHAL,
KATHRYN H. BALDWIN,
Attorneys.

NOVEMBER 1964.

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[10] Both of the prior cases in the District of Columbia Circuit which petitioners assert to be in conflict with the decision here are clearly distinguishable, as set forth in the opinion below (Pet. App. 8a–10a; 10a, n. 6).

APPENDIX

1. Section 27 of the Merchant Marine Act, 1920, 41 Stat. 999, 46 U.S.C. 883, as amended by the Act July 14, 1956, 70 Stat. 544, and the Act of July 5, 19[illegible] Public Law 86-583, 74 Stat. 321, provides:

> No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this Act: * * * *Provided further,* That no vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coastwise trade, by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt, shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States, its Territories (not including trust territories), or its possessions: * * *

2. Section 4 of Public Law 86-583, 74 Stat. 321, provided:

> SEC. 4. This A[illegible]all be effective from the time of enactme[illegible]ereof: *Provided, however,* That no vessel shall be deemed to have lost its

coastwise privileges as a result of the amendments made by this Act if it is rebuilt within the United States, its Territories (not including trust territories), or its possessions under a contract executed before such date of enactment and if the work of rebuilding is commenced not later than twenty-four months after such date of enactment.

3. Section 10(a) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009(a) provides:

> (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

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No. 520

Supreme Court of the United States

OCTOBER TERM, 1964

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, AMERICAN UNION TRANSPORT, INC., SEATRAIN LINES, INC., THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Petitioners*,

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL., *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT SEA-LAND SERVICE, INC. IN OPPOSITION

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November 1964

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 520

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, AMERICAN UNION TRANSPORT, INC., SEATRAIN LINES, INC., THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Petitioners,*

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY, ET AL., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT SEA-LAND SERVICE, INC. IN OPPOSITION

OPINION BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet., pp. 1a-10a) is reported at 335 F. 2d 292.

QUESTION PRESENTED

Whether, in the absence of any statutory provision for judicial review, the action of the Commissioner of Customs in documenting two vessels for use in the coastwise trade as U.S.-owned and built is subject to challenge in court by railroads and steamship companies claiming to be injured by competition from the operator of the vessels.

STATEMENT

The Commissioner of Customs, who is the head of the Bureau of Customs, an agency of the Treasury Department, is charged with the responsibility of documenting ships flying the American flag. Act of July 5, 1884, § 2, 23 Stat. 118, as amended, 46 U.S.C. § 2. The substantive dispute in this case concerns the decision of the Commissioner to document two vessels now being operated by this respondent, Sea-Land Service, Inc. The documentation took the form of re-enrolling the two ships for use in the coastwise trade after they had been rebuilt to increase their capacity.[1]

Two of the petitioners, Seatrain Lines, Inc., and American-Hawaiian Steamship Co., protested to the Commissioner against any documentation of the two ships. (J.A. 13-17, 17-55). They founded their protests on the Act of July 5, 1960, 74 Stat. 321. Section 1 of that Act amended Section 27 of the Merchant Marine Act of 1920, 41 Stat. 999, as amended, 46 U.S.C. § 883. Section 27 prohibits the transportation of merchandise in the coastwise trade in vessels that have not been built or, if rebuilt, rebuilt in the United States and that are not owned by citizens of the United States. The 1960 amendment to Section 27 provides that to remain eligible for the coastwise trade a rebuilt ship must be rebuilt in its entirety, including the construction of any major components of the hull or super-

[1] Documentation is of two kinds, registry and enrollment. "The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found. The purpose of an enrolment is to evidence the national character of a vessel engaged in the coasting trade or home traffic, and to enable such vessel to procure a coasting license." The Mohawk, 3 Wall. 566, 571 (1866).

structure, in the United States. Before that the use of foreign-built components was permitted so long as the actual rebuilding took place within the United States. Section 4 of the 1960 amendatory statute was a savings clause. It provided that a vessel would not lose its coastwise privileges by reason of the amendment if it was rebuilt in the United States (even though with a foreign-built component) under a contract entered into before the effective date of the statute, which was July 5, 1960, and if the work of rebuilding was begun within 24 months of that date.

The two vessels in question were, without dispute, built in the United States. They were also rebuilt in the United States, using foreign-built midbodies to increase their size and carrying capacity. The question raised by Seatrain and American-Hawaiian in their representations to the Commissioner of Customs and other officials was whether the ships were nevertheless within the savings clause. Seatrain and American-Hawaiian urged that the rebuilding done in the United States was not done under a contract executed before July 5, 1960. The Commissioner received and considered extensive written data that were submitted on behalf of the protestants and also heard them orally. (See J.A. 56-60, 67, 101). The statutes he administers do not provide for any formal hearing. In response to a request for such a hearing, he said that the public business of the registration of vessels would be seriously impeded "if every potential competitor could call for a formal public hearing before each documentation or renewal of a document for each of the 44,000 commercial vessels under the American flag." (J.A. 59). The Commissioner was not persuaded by the

showing made by the protestants and announced his decision to document the two vessels. (J.A. 10-11).

Complaints and intervening complaints were then filed in the United States District Court for the District of Columbia by the several petitioners. (J.A. 2-12, 69-73, 78-84, 88-96). They named the Secretary of the Treasury, the Commissioner of Customs, the Bureau of Customs and Sea-Land as defendants. The petitioners claimed in various ways to be in competition with Sea-Land and urged that the documentation of the two Sea-Land vessels was illegal and to their prejudice.[2] The defendants moved to dismiss on the ground that the petitioners' status as competitors or potential competitors of Sea-Land did not give them standing to challenge the governmental action of which they complained. (J.A. 74, 84-86, 103-04). The complaints were dismissed. (J.A. 104-05). On appeal the dismissal was affirmed by the Court of Appeals for the District of Columbia Circuit in a unanimous opinion written by Judge Burger for a panel that also included Chief Judge Bazelon and Judge Fahy. The Court of Appeals' opinion carefully reviewed the rele-

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[2] Seatrain is a common carrier by water, holder of a certificate of public convenience and necessity issued by the Interstate Commerce Commission, operating between New York and Savannah and New Orleans and Texas City. American-Hawaiian holds a certificate of public convenience and necessity as a common carrier by water, has engaged in the intercoastal trade and plans to re-enter that trade if and when it gets some ships. American Union Transport, Inc., owns and operates two vessels that engage in the coastwise trade between New York and other Atlantic ports and San Juan, Puerto Rico. The petitioner railroads transport freight across the country by arrangements with one another.

vant decisions of this Court and of the Court of Appeals concerning standing to challenge governmental action claimed illegally to aid a competitor. It analyzed the terms and history of the statute, Section 27 of the Merchant Marine Act of 1920, as amended in 1960, upon which some of the petitioners relied as giving them standing. (The railroad petitioners do not claim to have standing but only a "sufficient interest to sustain their right to participate as intervenors . . . ." [Pet., pp. 4-5].) The court held that on the cases the petitioners' status as competitors, without more, did not give them standing and that they had pointed to no statute conferring standing upon them. "Congress did not intend to insulate coastwise carriers from other domestic competition or to give them any legally protected right to be free of such competition." (Pet., p. 7a).

REASONS FOR DENYING THE WRIT

The Court of Appeals did not, as petitioners allege, decide an important question of federal law that should be settled by this Court. Rather, the decision below is an application to particular facts of well-established principles of law that govern the availability of a judicial remedy to a person claiming to be injured by governmental action that enhances the ability of another person to compete with him in his business. Under the decisions of this Court there is no uncertainty about the proper guide to decision. Competitive status alone is not enough to confer standing. *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118 (1939); *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938), but Congress may direct that aggrieved competitors be allowed to go into court. *American Truck-*

ing Ass'ns v. *United States*, 364 U.S. 1 (1960); *Alton R.R.* v. *United States*, 315 U.S. 15 (1942); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The question always is whether a statute explicitly or by necessary implication from its language and purpose accords to a person the right to have judicial review of governmental action that assists a competitor. The court below, which, functioning at the seat of the government, has more frequent occasion to seek an answer to that question than any other appellate court in the federal system, answered it "no" on the particular facts of this case. Its decision embodying that answer is not, as petitioners allege, in conflict with decisions of this Court or with prior decisions of the court below (the latter kind of conflict is not, in any event, a ground for certiorari), and it is clearly correct.

1. Under the guise of urging that the Court of Appeals' decision was on an important question of federal law, the petitioners argue the merits of their standing claim. (Pet., pp. 11-16). In doing so they recognize that the question in each case is, as we have stated it, whether Congress meant that competitors should have a right to complain of governmental acts that intensify their competition.[3] That petitioners do

[3] Petitioners approach the question through Administrative Procedure Act § 10(a), 60 Stat. 243, 5 U.S.C. § 1009(a). (Pet., pp. 11-12). That section provides that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." This basically restates the judge-made law of standing. Competition does not inflict a "legal wrong" upon the competitor who is hurt thereby, Alabama Power Co. v. Ickes, 302 U.S. 464, 480 (1938), and the nature of the inquiry into whether a person is "adversely affected or aggrieved . . . within the meaning of any relevant statute" is the same with and without § 10(a).

so recognize is shown by their marshalling and lengthy discussion of the same legislative materials that failed to persuade the court below to construe the statute as they urged. (Pet., pp. 13-16, espy. p. 14 n.25). The only question of federal law the petitioners assert, then, is whether the court below correctly decided this question under the terms of a particular statute. Their plea that this Court review the decision below because an important question of federal law is involved would better be stated forthrightly as a plea that they should have a third opportunity to convince a judicial tribunal that on principles whose force and validity are recognized on all sides they are right and the other side is wrong. This Court does not sit to hear cases of that kind.

2. Petitioners assert in general terms an inconsistency between the decision below and decisions of this Court, but they name no decision of this Court with which the decision below is inconsistent.[4] What they say is that "the strong trend of the law is that a licensee functioning in a field to which entry is restricted by licensing requirements has standing to test the legality of the issuing of a license to another to enter such field." (Pet, pp. 16-17). We deal below with the petitioners' use of the word license and variants as if such use provided a magic formula for standing. At this point we note that the only decisions claimed to represent the trend of which petitioners speak are decisions of the court below itself. Petitioners were so little impressed by the inconsistency they now profess to see

[4] They cite FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), in this discussion. That case is a classical instance of a decision that Congress had expressly conferred standing to complain of the enfranchising of new competition. *Id.* at 476-77.

that they did not ask the court below for a rehearing en banc, as they were privileged to do and as is the appropriate way of resolving intra-circuit conflicts. In fact there is no inconsistency.

The court below carefully distinguished its own recent decision in *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), *cert. granted*, 376 U.S. 948 (1964), pending as Nos. 26 and 30 of this Term (Pet., pp. 17-18). It did so on the ground that in that case, where the court held that state banks had standing to sue to enjoin a federal official from certificating a national bank, the court found "that federal statutes had guaranteed that state banks would be free of certain competition from national banks." (Pet., p. 10a n.6). Petitioners say that this is not a real distinction because in this case too the relevant statute was designed to protect existing licensees. The point is, however, that the court below held to the contrary with respect to the statute invoked by petitioners, and petitioners thus are merely reasserting their principal argument.[5]

The petitioners also profess to see a conflict with *Atchison, T.&S.F. Ry.* v. *Summerfield*, 229 F.2d 777 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 926 (1956). (Pet., pp. 18-19). The court below saw no such conflict (Pet., pp. 8a-10a), and there is none. There certain railroads challenged the Post Office Department's

[5] The Government has renewed in this Court its contention that the complainants in the *Whitney Bank* case do not have standing. (Br. for Pet'r Saxon, Nos. 26 and 30, O.T. 1964, pp. 36-40). If the Government's position on the point were sustained by this Court, it would mean only that the Court of Appeals had misread the statutes involved in the *Whitney Bank* case. It would have no implication for this case.

first-class-mail-by-air program. They were held to have standing to do so because they had made substantial investments in mail-carrying equipment in fulfillment of a statutory duty to carry the mail, and their investment, made at the Government's command, would be rendered less valuable by governmental action. The impact upon them was immediate and direct, and it was in an area where the Government itself had directed the prior action for which they were now to be made to suffer. There is nothing of the sort in this case. No governmental action has compelled the petitioners to engage in the coastwise trade or to acquire equipment in order to do so. Indeed, the emptiness of the petitioners' assertions is pointed up by the situation of the petitioner American-Hawaiian, which does not even have any seagoing equipment.[6]

In truth, this case and the cases cited by petitioners are only several among many in which the court below has dealt with the problem of competitors' standing. It was the decision of the court below denying standing to privately-owned utilities to complain against governmental loans to competing municipal utilities that was affirmed by this Court in what is perhaps the leading case on the point, *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938), *affirming* 91 F.2d 303 (D.C. Cir. 1937). For other cases in which competitors were held to lack standing because no statute conferred it, see *Texas State AFL-CIO* v. *Kennedy*, 330 F.2d 217 (D.C. Cir. 1964), *cert. denied*, Oct. 12, 1964, No. 182, O.T. 1964; *Union Nat'l Bank* v. *Home Loan Bank Bd.*, 233 F.2d 695 (D.C. Cir. 1956); *Kansas City Power & Light Co.* v.

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[6] The railroad petitioners can make no claim under the cited case and indeed do not claim to have standing on any ground. (Pet., pp. 4-5).

McKay, 225 F.2d 924 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 884 (1955); *United Milk Producers* v. *Benson*, 225 F.2d 527 (D.C. Cir. 1955). And for other cases in which the court found that Congress had conferred standing on competitors, see *National Airlines, Inc.* v. *CAB*, 306 F.2d 753, 757-58 (D.C. Cir. 1962); *National Coal Ass'n* v. *FPC*, 191 F.2d 462 (D.C. Cir. 1951). Even if inconsistency of decision within a circuit were a ground for certiorari, which it is not, there is no inconsistency in these decisions, all of which proceed upon the principle we have stated.

3. The petitioners' statement of reasons for granting the writ, as we have indicated, goes principally to the merits of the question of their standing. Taken as a brief on the merits, it is unsuccessful. In their argument the petitioners use over and again words such as licensees, licenses and licensing. Only so are they able to give any plausibility to their case. But the existence of a license is by no means a guarantee of standing to challenge governmental action that purportedly aids a competitor. See *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118, 136-39 (1939).

In any event, the licenses to which the petitioners refer, the documents evidencing enrollment of vessels—documents that must pertain to a vessel regardless whether its owner is engaged in common carriage—are not, as petitioners seek to suggest, like certificates of public convenience and necessity authorizing common carriers to provide service. The Interstate Commerce Commission, not the Commissioner of Customs, issues these to common carriers by water in the coastwise

trade.[7] Licensees in the regulated industries typically have substantial rights against one another when it comes to the franchising of new or additional competition. These petitioners would have such rights as against Sea-Land were the question of its basic authority to engage in the coastwise trade in issue.

The decision of the Court of Appeals, in which it plainly was correct, was simply that in the statute upon which petitioners rely Congress was not concerned with competition among carriers. Section 27 of the Merchant Marine Act of 1920, and particularly the 1960 amendment in issue here, is a "Buy American" statute. Congress meant by it "to stimulate and encourage resort to domestic shipyards and thus ensure them sufficient business so that their facilities would be adequate in time of national emergency." (Pet., p. 7a).

The 1960 amendment to Section 27, with its savings clause, was enacted after a ruling of the Bureau of Customs construing an amendment enacted in 1956, which for the first time required that, if rebuilt, ships be rebuilt in the United States to retain their coastwise privileges. The Bureau ruled that the amendment did not prohibit the use of foreign-built midbodies to enlarge vessels so long as they were installed in this country. The House committee explained the reason for the 1960 amendment, including the savings clause:

> "Shipbuilding officials in this country view with alarm the Customs ruling permitting the use, with-

[7] Water Carrier Act, 54 Stat. 929, as amended, 49 U.S.C. §§ 901-23. The trade between the continental United States and Puerto Rico is regulated by the Federal Maritime Commission under the Shipping Act of 1916, 39 Stat. 728, as amended, 46 U.S.C. §§ 801-42, because the Water Carrier Act does not cover United States-Puerto Rico transportation. See 49 U.S.C. § 902(i).

out loss of coastwise privileges, of foreign mid-sections in the rebuilding of domestic vessels. It was contrary to the spirit of the statute involved, they argued, and could open the way to other even more damaging possibilities . . ..

* * *

"Your committee is of the opinion that this legislation is needed to close the above-mentioned loophole in the existing statute and to buttress our traditional national objectives affecting the coastwise trade and the shipbuilding industry. Relying upon the latest Bureau of Customs ruling, a number of shipowners and builders have in good faith entered into contracts requiring foreign-built major components, the completion of which in some cases, will take up to nearly 24 months. Accordingly, your committee feels that the time period in section 4 is fair and reasonable to all." H.R. Rep. No. 1887, 86th Cong., 2d Sess. 3 (1960); see also S. Rep. No. 1279, 86th Cong., 2d Sess. 3 (1960).

The committee, moreover, set out the comments of the Department of Commerce, which said that one of the major objectives of the shipping statutes, which the amendment would assist in fulfilling was

"to foster and maintain the shipbuilding industry in the United States by placing work in the domestic shipyards so that the yards will be sustained for mobilization and national defense purposes. At the present time, shipyards in this country need work very badly and there are recent examples of instances where, had this proposed legislation been the law, additional work might have been generated for American shipyards." H.R. Rep. No. 1887, *supra* at 7; S. Rep. No. 1279, *supra* at 6.

Nothing petitioners cite indicates any different purpose. The Court of Appeals, which, contrary to peti-

tioners' assertion that it "looked to a fragment of the basic statute" (Pet., p. 13), carefully traced the statutory history beginning in 1920, was unable to find any contrary indication, and its decision was clearly correct.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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